

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 22 2008

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

HECTOR ZUNIGA,

Defendant - Appellant.

No. 05-30480

D.C. No. CR-03-00016-2-RFC

MEMORANDUM^{*}

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Appeal from the United States District Court
for the District of Montana
Richard F. Cebull, District Judge, Presiding

Argued July 25, 2006; Resubmitted January 15, 2008
Portland, Oregon

Before: REINHARDT and GRABER, Circuit Judges, and LEW,^{**} District Judge.

A federal jury convicted Defendant Hector Zuniga of one count of conspiracy to distribute methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846. The district court sentenced him to 168 months in prison.

^{*} This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

^{**} The Honorable Ronald S.W. Lew, United States District Judge for the Central District of California, sitting by designation.

In a prior memorandum disposition we affirmed the conviction and deferred Defendant's challenges regarding his 168-month sentence. United States v. Zuniga, No. 05-30480 (9th Cir. filed Aug. 21, 2006). We now address the remaining issues on appeal and affirm the sentence imposed by the district court.

1. Defendant contends that the district court improperly applied a three-level enhancement under U.S.S.G. § 3B1.1(b) (2004) for his role in the methamphetamine distribution conspiracy. To support an enhancement under the Guidelines, the government must prove the defendant's role by a preponderance of the evidence. United States v. Maldonado, 215 F.3d 1046, 1051 (9th Cir. 2000). We review for clear error a district court's findings related to a sentence enhancement. Id. at 1050.

A three-level sentence enhancement under U.S.S.G. § 3B1.1(b) (2004) requires that the defendant "was a manager or supervisor . . . and that the criminal activity involved five or more participants or was otherwise extensive." There is evidence in the record from the three-day jury trial supporting the identification of five participants in the drug distribution conspiracy. Furthermore, Guadalupe Cardenas, one of Defendant's co-conspirators, testified at the trial that Defendant paid him to drive Defendant's car to New Hampshire for purposes of setting up a methamphetamine sale and that Defendant supplied the drugs to him without

payment until after they were sold. Those uncontroverted facts support a finding of Defendant's supervisory or managerial role. Cf. Maldonado, 215 F.3d at 1050 ("A single incident of persons acting under a defendant's direction is sufficient evidence to support a two-level role enhancement.").

2. Defendant also argues for resentencing because the government represented at a pretrial conference that it would not be seeking a role enhancement. According to Defendant, the government should be estopped from seeking an enhancement. Although Defendant asserts that he participated in a post-trial safety valve interview because the government stated that it would not seek a sentence enhancement, he does not assert that his participation was to his detriment, nor does the record reveal any detriment. Because detrimental reliance is a sina qua non of any estoppel claim, see United States v. Gamboa-Cardenas, 508 F.3d 491, 502 (9th Cir. 2007), Defendant's argument fails.

3. Finally, Defendant challenges the reasonableness of his sentence. Reviewing the sentence's procedural soundness and substantive reasonableness under an abuse of discretion standard, Gall v. United States, 128 S. Ct. 586, 591, 596-98 (2007), we affirm the 168-month sentence imposed by the district court.

The transcript from the sentencing hearing reveals that the district court committed no procedural error. As required by Gall, the district court: (1)

correctly calculated Defendant's sentence under the Guidelines; (2) recognized that the Guidelines are advisory, repeatedly referring to them as such; (3) provided an opportunity for the parties and Defendant's family to argue for an appropriate sentence, both through written objections and in open court; and (4) considered the 18 U.S.C. § 3553(a) factors. Gall, 128 S. Ct. at 597. In addition, the district court stated on the record adequate reasons for the sentence imposed to support appellate review. Id.

The district court did not abuse its discretion in imposing the 168-month sentence. First, the fact that Defendant was a manager or supervisor of the criminal activity means that he was statutorily ineligible for application of the safety valve. 18 U.S.C. § 3553(f)(4). In addition, even assuming that the purity of a methamphetamine mixture is a basis for a downward departure, Defendant failed to establish at trial that the relatively low impurity of the methamphetamine mixture for which he was convicted was "unusually impure." See United States v. Mikaelian, 168 F.3d 380, 389-90 (9th Cir.), amended, 180 F.3d 1091 (9th Cir. 1999). Similarly, Defendant's work history and family ties and responsibilities are not extraordinary and therefore provide no particular support for a sentence outside the Guidelines range. See U.S.S.G. § 5H1.5 (2004) (stating that "[e]mployment record is not ordinarily relevant in determining whether a departure is warranted");

U.S.S.G. § 5H1.6 (2004) (providing that "family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted").

Finally, Defendant's contention that a lower sentence is appropriate because his criminal activity constituted aberrant behavior is contradicted by the district court's finding that the drug distribution conspiracy spanned a period of at least three months, during which Defendant managed or supervised at least one other member of the conspiracy.

AFFIRMED.